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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-699

F. DAVID MATHEWS,
Secretary of Health, Education, and Welfare,
Appellant,

—v.—

LEON GOLDFARB,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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On Appeal from the United States District Court for the Eastern District of New York

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellee moves to affirm the judgment of the district court.

OPINION BELOW

The opinion of the three-judge district court is reported at 396 F. Supp. 308 (E.D.N.Y. 1975).

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court declaring 42 U.S.C. §402(b), (c)(1)(C), (e), (f)(1)(D) unconstitutional insofar as it discriminates against individuals insured under social security and their spouses on the basis of sex.

Appellee Leon Goldfarb, retired and over seventy years of age, applied for monthly social security benefits on the earnings record of his deceased wife, Hannah Goldfarb. Leon Goldfarb is not an insured individual under social security. Hannah Goldfarb was a fully insured individual who, prior to her death in 1968, had paid social security taxes for some twenty-five years.

Leon Goldfarb's application was denied on the sole ground that he did not claim and failed to prove he received "at least one-half support from [his] wife when she died."[1] Such proof is required only when

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[1] To attract benefits for her spouse, the female wage earner must supply all of her own support and at least one-half of her husband's, generally 75 percent of family income. Cf. *Frontiero* v. *Richardson*, 411 U.S. 677, 680 n. 4 (1973). It is not enough, as appellant's presentation might suggest, Jurisdictional Statement filed by appellant, Secretary of Health, Education, and Welfare F. David Mathews, on November 12, 1975 [hereinafter cited as J.S.], 7 & n. 7, that she supply more than 50 percent of family income. Also questionable is appellant's delineation of pension and social security as an "either/or"--one "rather than" the other--proposition. (J.S. 5 n. 4.) A substantial and growing

the insured individual is female. Benefits to a spouse on a male insured individual's earnings record are not conditioned upon a support test. It is undisputed that, had the gender of these spouses been reversed, appellee's application would have been granted.

QUESTION PRESENTED

Whether 42 U.S.C. §402(b), (c)(1)(C), (e), (f)(1)(D), which authorizes social security benefits for a spouse on a male insured individual's earnings record without regard to dependency, but conditions benefits for the spouse of a female insured individual on proof of dependency, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.

ARGUMENT

This is a gender discrimination-equal protection case.[2] The gender differentiation

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proportion of the nation's workers (those engaged in the private sector as well as those employed by state or municipal units that have opted into social security) are covered by both pension plan and social security.

[2] See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975). Appellant's reliance on *Weinberger* v. *Salfi*, ___ U.S. ___, 95 S. Ct. 2457 (1975), J.S. 4-5, is misplaced. No immutable birth characteristic (race, national origin, sex, legitimacy) figured in that case. Nor does "due process/conclusive presumption" analysis, the doctrine reexamined in *Salfi*, bear on the instant case, which involves "discrimination based on gender as such." See *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n. 20 (1974).

at issue is not rationally distinguishable from those struck down in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Four federal district courts have so ruled.[3] Furthermore, appellant's predecessor and the Solicitor General have acknowledged before this Court that the sex differentials involved in *Wiesenfeld* and *Frontiero* are "very closely analogous"[4] to, and reflect the same congressional judgment[5] as the differential at issue here. In these circumstances, and in light of this Court's precedent from *Reed* v. *Reed*, 404 U.S. 71 (1971), through *Stanton* v. *Stanton*, 421 U.S. 7 (1975), plenary consideration is not warranted.

Like the dependency test for male but not female military spouses invalidated in Sharron and Joseph Frontiero's case, the virtually identical test in the case at bar "deprive[s] women of protection for their families which men receive as a result of their employment." *Wiesenfeld*, 420 U.S. at 645.

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3 In addition to the instant case, see *Silbowitz* v. *Secretary of Health, Education, and Welfare*, 397 F. Supp. 862 (S.D. Fla. 1975); *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118 (D. Md. 1975)(three-judge court); *Coffin* v. *Secretary of Health, Education, and Welfare*, ___ F. Supp. ___, No. 1890-73 (D.D.C. July 14, amended August 8, 1975)(three-judge court).

4 Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld*.

5 Brief for the Appellees at 8, *Frontiero* v. *Richardson*.

Neither the alleged administrative economies of dividing workers and their spouses into breadwinning male/dependent female categories (J.S. 11 n. 10),[6] nor fiscal considerations

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6 Appellant's administrative cost argument is virtually a carbon copy of the one rejected in *Frontiero*. See Brief for the Appellees at 8-10, *Frontiero* v. *Richardson*; 411 U.S. at 689. Again, no concrete evidence is tendered to support the rationality of the assumption appellant attributes to Congress, that presuming women's dependency effects an economy. On the contrary, Government statistics point in an opposite direction. Husband and wife are both earners in close to half the nation's husband-wife families. On the average, the working wife supplies over half her own support. See U.S. Working Women, A Chartbook, U.S. Department of Labor, Bureau of Labor Statistics Bull. 1800, Charts 39, 40 (1975) (in 1973 both husband and wife were earners in 47% of husband-wife families; on the average, the wife's earnings accounted for 26% of family income, with a higher proportion in younger families and in families of minority races).

(J.S. 5),[7] suffice to justify the gender-based generalization that devalues the woman's efforts in the economic sector. See *Frontiero*, 411 U.S. at 688-90 & nn. 22, 23.[8] Nor should this Court entertain repetition of the argument, fully aired less than a year ago, that the *Frontiero* principle does not apply to a worker's social insurance. Compare J.S. 10 with Brief for the Appellant

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[7] Appellant's cost estimates (compare J.S. 5 with Brief for the Appellant at 22, *Weinberger* v. *Wiesenfeld*) contrast with the considerably lower sum entailed in implementing the recommendation of the 1975 Advisory Council on Social Security that "benefits for husbands and widowers should be provided without a support test as are benefits for wives and widows." Reports of the Advisory Council on Social Security 2, 37-38 (March 1975). Moreover, appellant's estimates may bear substantial downward adjustment if movement continues toward the recognized goal of universal social security coverage for all wage earners. See Advisory Council on Social Security Report, S. Doc. No. 208, 80th Cong., 2d Sess. 6 (1948). Compare S. Rep. No. 628, 74th Cong., 1st Sess. (1935) (social security system initially covered 50% of gainfully employed workers), with Railroad Retirement System Report, H.R. Doc. No. 350, 92d Cong., 2d Sess. 107-109 (1972) (social security covers about 90% of gainfully employed workers).

[8] As the U.S. Commission on Civil Rights has stated, "[t]here can be no more invidious form of sex discrimination" than the overt gender classifications remaining in the Social Security Act. Toward Elimination of Sex-Based Differentials in the Social Security System 7-10, 39 (December 1974).

at 17, *Weinberger* v. *Wiesenfeld*. And see *Frontiero*, 411 U.S. at 690. For Hannah Goldfarb, like Paula Wiesenfeld, "not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others." *Wiesenfeld*, 420 U.S. at 645. In short, it is too late in the day to rehearse the proposition that overt gender classification is a permissible means to determine benefits due on the earnings record of a covered worker.

Appellant recalls this Court's recognition in *Wiesenfeld*, 420 U.S. at 645, that "[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses . . . is not entirely without empirical support." (J.S. 7.) Inexplicably, appellant declines to read on. As explained by Mr. Justice Brennan, 420 U.S. at 645:

> But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

Mr. Justice Powell, writing for himself and Mr. Chief Justice Burger, underscored the point, 420 U.S. at 654-55:

> The statutory scheme . . . impermissibly discriminates against a female wage earner because it provides her family less protection than it provides the family of a

male wage earner, even though the family needs may be identical.[9]

Mindful of this Court's instruction not to accept administrative convenience or cost, purely budgetary considerations[10] or "the mere recitation of a benign, compensatory purpose" as an "automatic shield" for "archaic and over-broad" line drawing by gender,

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[9] Mr. Justice Powell also observed that *Wiesenfeld* is not properly explained as a "child care" case, for "the payment of benefits is not conditioned on the surviving parent's decision to remain at home." 420 U.S. at 654.

[10] The gender pigeonholing at issue here has scant relationship to the "strained resources" of the Social Security trust fund (J.S. 5). For the causes of the strains and burdens to which appellant points are demographic shifts in society--later entrance of young people into the work force, increased longevity, and lower birth rates. These shifts mean 1) fewer working years and longer retirements for social security taxpayers, and 2) a steady decline in the ratio of workers paying social security taxes to beneficiaries. See Reports of the Advisory Council on Social Security, *supra* note 7, at 61-63. Whatever the adjustments required to alleviate current strains and burdens, continued discrimination against wage-earning women cannot be urged as a rational or realistic means to help hold the line. Moreover, as this Court's precedent makes clear, cost saving cannot justify an otherwise invidious discrimination. See, e.g., *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973), summarily reversing 349 F. Supp. 491 (D.N.J. 1972); Brief for Appellee at 26-30, 45-49, *Weinberger* v. *Wiesenfeld*, *supra*.

Wiesenfeld, 420 U.S. at 643, 648,[11] the court below pointedly observed (396 F. Supp. at 309, Appendix to J.S. at 3a):

> Whatever may have been the ratio of contributions to family expenses of the Goldfarbs while they both worked, Mrs. Goldfarb was entitled to the dignity of knowing that her social security tax would contribute to their joint welfare when the couple . . . retired and to her husband's welfare should she predecease him. She paid taxes at the same rate as men and there is not the slightest scintilla of support for the proposition that working women are less concerned about their spouses' welfare in old age than are men. The government has failed to justify this gender-based discrimination.

CONCLUSION

The gender lines in this case, *Frontiero* and *Wiesenfeld* are indeed "very closely

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[11] Plainly, the Court did not consider the absence of a support test the "fatal flaw" in *Wiesenfeld*. Cf. J.S. 9. Mr. Justice Brennan merely noted that flaw as one of two factors making the *Wiesenfeld* gender line "in some ways more pernicious" than the one in *Frontiero*. The other factor, present in this case as in *Wiesenfeld*, concerned the unfairness of requiring female workers to contribute to social security just as male workers do, but denying the female family coverage a similarly situated male would receive. 420 U.S. at 645.

analogous"[12] and cannot be distinguished on any principled basis. Because the Constitution "forbids the gender-based differentiation that results in the efforts of women workers required to pay social security taxes producing less protection for their families than is produced by the efforts of men," *Wiesenfeld*, 420 U.S. at 645, the determination of the district court, and the judgment based thereon should be summarily affirmed.

Respectfully submitted,

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12 *Supra*, p. 4 at n. 4.